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North Carolina Environmental Management Commission
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SUBJECT: LEGAL ISSUES REGARDING PROPOSED JORDAN RULES

The City Attorney's Office of the City of Durham submits these comments separately from those submitted by the City's Public Works Department/Stormwater Services Division and the City's Water Management Department in order to highlight fundamental legal problems inherent in the Jordan Water Supply Nutrient Strategy Rules (the "Rules"). The basic problem – that the existing development rule is not authorized under current legislation – is a major one. *We strongly recommend that the proposed rule regarding existing development be reexamined and taken off the table until the General Assembly can study and develop legislation regarding the complex issue of how much existing development should be impacted in order to achieve water quality objectives, and how much cost, if any, should be born by local government rather than existing development itself.* The proposed rule on existing development is unprecedented in requiring local governments to acquire and possibly condemn private property, and is ripe for legal challenge that could require years of litigation to resolve. Action by the General Assembly to study this issue should certainly be preferred over what could be years of litigation.

The legislation cited as a basis for the proposed Rules is the 1997 Clean Water Responsibility Act (CWRA). That Act imposed regulations on hog farming and wastewater treatment plants to address water quality concerns and also made amendments to existing law to strengthen statewide stormwater control provisions, and implement water quality management plans for the major river basins and watersheds in the state. The stormwater and water quality management amendments are found in GS 143-214.7, GS 143-215.8B, and GS 143B-282. *Significantly, those statutes, as amended, refer to "nonpoint sources" of pollution but do not specifically address how to deal with existing development. And, they do not give the Commission the authority*

to impose upon local governments the cost burden of addressing water quality impacts from existing development, or responsibility for condemning private land for water quality protection purposes.

That is, however, exactly what the proposed Rules require. Proposed Rule .02B.0266 states that **local governments** are to reduce or otherwise offset nutrient contributions from existing developed lands, not just lands the local government might own itself, but all **private** existing developed lands. The local government rather than the source of the pollution – existing private development – is made the focus of the new existing development rule. Local governments are required to engage in such activities as ‘removing existing built upon area’ and ‘retrofitting existing development.’ These built upon areas and existing developments are private, however, and not owned by the municipality. To remove private impervious areas or structures for meaningful retrofitting would require condemnation.

This was not what was contemplated in the Clean Water Responsibility Act. The provisions of the CWRA speak to **regulatory measures** -- developing “ordinances and regulations” for “stormwater control programs” (GS 143-214.7(c)) that ‘apportion responsibility for pollution reduction amongst point and nonpoint sources in a **fair, reasonable, and proportionate manner.**’ (GS 143-215.8B). With regard to water quality related rules for point and nonpoint sources, as are being implemented in the Jordan Rules, the EMC is authorized to adopt “strategies” that include but are not limited to “additional monitoring, effluent limitations, supplemental standards or classifications, best management practices, [and] protective buffers.” The General Assembly’s focus is clearly prospective.

This is underscored by the recent adoption of Session Laws 2006-246, “An Act to Provide for the Implementation of Federal Phase II Stormwater Management Requirements and to Protect Water Quality” (“the 2006 Stormwater Act.”) That Act, which not only implemented the federal Phase II rules for both cities and counties, confirmed the authority of all cities and counties regarding stormwater controls. The General Assembly described that authority as the authority to “implement illicit discharge detection and elimination controls, construction site stormwater runoff controls, and post-construction runoff controls through an ordinance or other regulatory mechanism.” There is no mention of acquisition or condemnation of developed private property. Notably, in the 2006 Act “development” subject to post-construction rules is limited to activity that **increases** impervious area or run-off. And, “redevelopment” which does not increase impervious area or runoff is exempted from post-construction stormwater rules.

Certainly, had the General Assembly intended that local governments be required to acquire private developed properties, in particular through condemnation, to achieve water quality goals, that obligation and burden would be explicitly set forth in the many pieces of legislation that have been passed regarding stormwater quality in the past decade. In sum, this particular rule exceeds the authority of enabling State legislation. It will be subject to attack before the Rules Review Commission and to years of litigation if it is not deleted from the proposed Rules.

Rather than adopt this Rule, the EMC should request that the General Assembly study the issue of how best to address existing development in its development of basin and water quality protection plans. That study would include a necessary examination of the following issues which are not addressed or are inadequately addressed in the Jordan Rules:

- The degree to which existing development should contribute to water quality improvements in light of the benefits of such participation and the considerable burdens;
- Whether the cost of dealing with runoff from existing development should fall on private owners of those properties. (The Jordan Rules anticipate that it will, instead, fall on local government. However, this conflicts with the approach taken for over a decade by local government stormwater programs, which places the cost of pollution control on private owners.)
- The legality of, and means by which, the costs of stormwater pollution control could be imposed directly on existing development instead of on local government;
- The equity of imposing on some local governments in the state, but not others, the billions of dollars of cost to acquire existing private developed properties, through condemnation or otherwise, for water quality purposes. (This approach appears to contravene state statutes regarding implementation of stormwater programs statewide.)
- The cost to local governments of acquiring private lands, building stormwater devices, and maintaining those facilities for existing development. (As persuasively shown in the City's other submissions, DENR's cost estimates for addressing existing development are inadequate and erroneous, and represent, at best, only one-fourth of the real cost to local government.)
- The legality, for localities that operate stormwater services as an enterprise, such as Durham and Greensboro, of charging jurisdiction-wide fees but using those fees to support pollution control devices in older developments, but not newer developments. (The Jordan Rules compel this approach unless cities make difficult and expensive changes to their existing utility charges.)
- The possible need for changes in NCGS 43A regarding public condemnation, to broaden the authority to condemn for water quality purposes. (Existing authority, arguably, is limited only to drainage improvements.)
- The existing protections in the recent 2006 Stormwater Act for redevelopment and the necessity of removing those protections to allow for implementation of water quality requirements over time.

In light of the many issues needing examination, as briefly capsulized above, the City of Durham does not believe that that the EMC should move forward to adopt the first-ever, precedent-setting Jordan Rule requiring that local governments be responsible

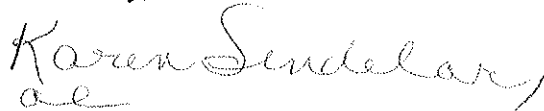
for the costs of addressing pollution from existing development. If, notwithstanding these arguments, the EMC determines to adopt the existing development rule, the City requests that the rule proposed below, as it reasonably addresses city's concerns of substantial liability for issues regarding existing development. This rule will offer some protection to cities from the severe civil and criminal penalties and injunctive actions that can be imposed on local governments by the state.

Proposed Rule to follow 02B.0266(4) as new subparagraph (5) with existing (5) renumbered as (6).

"The above provisions shall not be interpreted to require the condemnation of private property, or the acquisition of such property in the absence of state funding from such sources such as the EEP program or other state funding sources and Rules adopted under (4) above shall not require such actions. Notwithstanding any contrary implications in this Rule, no local government may be subjected to any civil, criminal, or injunctive action under state authority for failure to realize reductions in local loads from existing development if the local government has produced a stormwater management program under (3) above which evidences a meaningful examination of existing development in the local government's jurisdiction and proposes load reducing activities to address existing development."

The City of Durham appreciates the time and energy that has gone into these Jordan Rules. However, we respectfully suggest that the EMC revisit the existing development rule as suggested above.

Sincerely,



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